

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

GEORGE W. SCHWAN,

Case No.: 3:17-bk-00912-JAF

Debtor.

Chapter 7

**TRUSTEE'S RESPONSE IN OPPOSITION TO CREDITOR LINDA DIAMOND'S
MOTION FOR RECONSIDERATION OF ORDER GRANTING TRUSTEE'S
AMENDED MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT
BY AND AMONG TRUSTEE, DEBTOR, DIANE SCHWAN, GALE DEEM,
THE DIANE L. SCHWAN TRUST AND RIGHT TIME INVESTMENTS, LLC**

Aaron R. Cohen, as Chapter 7 Trustee (the "Trustee"), by and through undersigned counsel, files his Response (this "Response") in Opposition to the Motion for Reconsideration (the "Motion for Reconsideration") (Doc. 46) of the Order Granting Trustee's Amended Motion for Approval of Settlement Agreement (the "Settlement Motion") by and among Trustee, Debtor, Diane Schwan, Gale Deem, The Diane L. Schwan Trust and Right Time Investments LLC (the "Order Approving Settlement") (Doc. 44) filed by creditor Linda Diamond ("Diamond"). In support of this Response, the Trustee would say:

1. On September 5, 2017, the Trustee filed the Settlement Motion (Doc. 38), seeking approval of the Settlement Agreement described therein (the "Settlement Agreement") pursuant to Federal Rule of Bankruptcy Procedure 9019 and Local Bankruptcy Rule 2002-4.
2. As set forth clearly in the negative notice legend on the first page of the Settlement Motion, interested parties had 21 days to file any response to the Settlement Motion, plus an additional three days if the party received service of the Settlement Motion by mail.

3. Diamond's counsel, Christian Waugh ("Mr. Waugh"), received electronic service of the Settlement Motion. Accordingly, September 26, 2017 was the deadline for Diamond to file any response to the Settlement Motion (the "Response Deadline").

4. Mr. Waugh filed the Motion for Reconsideration and an Objection (Doc. 45) to the Settlement Motion on October 4, 2017, eight days after the Response Deadline.

5. Through the Motion for Reconsideration, Mr. Waugh argues the Court should set aside the Order Approving Settlement for Mr. Waugh's excusable neglect, and particularly that he miscalculated and miscalendared the Response Deadline, and confused it with a deadline in another case.

6. Diamond and Mr. Waugh rely on Federal Rule of Bankruptcy Procedure 9024, made applicable hereto by Federal Rule of Civil Procedure 60, which provides in relevant part that "a court may relief a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... or (6) any other reason justifying relief from operation of the judgment."

7. The Motion for Reconsideration fails to set forth sufficient basis to justify amendment or setting aside of the Order Approving Settlement under Rule 9024 or other applicable law, and should be denied.

8. The Eleventh Circuit has made clear that an attorney's failure to meet a deadline does not constitute excusable neglect. *See Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997), citing *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (attorney error based on a misunderstanding of the law is an insufficient basis for excusing a failure to comply with a deadline); *see also Committee v. Yost*, 92 F.3d 814, 825 (9th Cir. 1996) (ignorance of procedural rule not excusable neglect); *United States v. Clark*, 51 F.3d 42

(5th Cir. 1995) (dicta) (incorrect application of rules in calculating time to file appeal might not be excusable neglect).

9. The Eleventh Circuit further explained that "If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline. We do not believe that the Court intended a practice that would require courts to be that lenient about disobedience to plain law." *Advanced Estimating System*, 130 F.3d at 999.

10. That Waugh believed the deadline was the same as a deadline for another pending case in a different court is misleading, since the other motion was filed on September 20, 2017, more than two weeks after the Trustee filed the Settlement Motion. The docket in the other case is attached hereto and incorporated herein as **Exhibit A**. There would appear to be no reason Waugh would have believed the deadlines were the same.

11. The Trustee's Memorandum (the "Memorandum") in Support of the Settlement Motion and the Trustee's Response in Opposition to Creditor Linda Diamond's Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(a) (Doc. 32) are incorporated by reference herein. As set forth in the Memorandum, the Settlement Agreement does not seek to deny Diamond's right to seek dismissal of the Bankruptcy Case, nor does it seek to impact in any way her claims in the Discharge Action, though the Trustee opposes the relief sought by both pleadings.

WHEREFORE, Aaron R. Cohen, as Chapter 7 Trustee, respectfully requests the Court enter an Order (i) denying the Motion for Reconsideration, and (ii) granting such other and further relief as the Court deems just and proper.

Dated: October 11, 2017

AKERMAN LLP

By: /s/ Jacob A. Brown

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Attorneys for Aaron R. Cohen, Chapter 7 Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished either by electronic notification or by United States mail, postage prepaid and properly addressed, this 11th day of October, 2017 to:

George W. Schwan
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Eric D. Jacobs, Esq.
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Aaron R. Cohen, Chapter 7 Trustee
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The Diane L. Schwan Trust
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Gale Deem
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Right Time Investments, LLC
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Christian W. Waugh, Esq.
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The Villages, FL 32159

and to all parties on the attached mailing matrix.

/s/ Jacob A. Brown
Attorney

Label Matrix for local noticing
113A-3
Case 3:17-bk-00912-JAF
Middle District of Florida
Jacksonville
Wed Oct 11 15:47:00 EDT 2017

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Dallas, TX 75266-0702

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(u)Jerry A. Funk
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**U.S. District Court
Southern District of Florida (Ft Pierce)
CIVIL DOCKET FOR CASE #: 2:17-cv-14296-DMM**

C&C Title Services, LLC v. KeyBank N.A.
Assigned to: Judge Donald M. Middlebrooks
Referred to: Magistrate Judge Shaniek M. Maynard
Cause: 28:1332 Diversity-Tort/Non-Motor Vehicle

Date Filed: 08/18/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff**C&C Title Services, LLC**

represented by **Christian W Waugh**
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13940 US Hwy 441
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant**KeyBank N.A.**

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/18/2017	<u>1</u>	COMPLAINT against KeyBank N.A.. Filing fees \$ 400.00 receipt number 113C-9985146, filed by C&C Title Services, LLC. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summon(s), # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit) (Waugh, Christian) (Entered: 08/18/2017)
08/18/2017	2	Clerks Notice of Judge Assignment to Judge Donald M. Middlebrooks.

		Pursuant to 28 USC 636(c), the parties are hereby notified that the U.S. Magistrate Judge Shaniek M. Maynard is available to handle any or all proceedings in this case. If agreed, parties should complete and file the Consent form found on our website. It is not necessary to file a document indicating lack of consent. (mc) (Entered: 08/21/2017)
08/21/2017	<u>3</u>	Summons Issued as to KeyBank N.A. (mc) (Entered: 08/21/2017)
08/22/2017	<u>4</u>	ENDORSED ORDER. Plaintiff alleges this Court has jurisdiction over this case based on diversity. However, the allegations fail to plead diversity. See Travaglio v. Am. Exp. Co, 735 F.3d 1266, 1268 (11th Cir. 2013) (When a plaintiff files suit in federal court, she must allege facts that, if true, show federal subject matter jurisdiction over her case exists.). Specifically, the party asserting diversity must prove the citizenships of all the members of the limited liability company. Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C, 374 F.3d 1020, 1022 (11th Cir. 2004). Plaintiff shall file an amended complaint by August 24, 2017 correcting the diversity allegations or file a notice of dismissal by that date. Signed by Judge Donald M. Middlebrooks on 8/22/2017. (kcr) (Entered: 08/22/2017)
08/22/2017	<u>5</u>	First AMENDED COMPLAINT against All Defendants, filed by C&C Title Services, LLC. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit) (Waugh, Christian) Modified text on 8/23/2017 (mc). (Entered: 08/22/2017)
09/13/2017	<u>6</u>	SUMMONS (Affidavit) Returned Executed on <u>1</u> Complaint, with a 21 day response/answer filing deadline by C&C Title Services, LLC. All Defendants. (Waugh, Christian) (Entered: 09/13/2017)
09/20/2017	<u>7</u>	ORDER REFERRING CASE AND SETTING TRIAL DATE: (Jury Trial set for 5/14/2018 at 9:00 AM in the Fort Pierce Division before Judge Donald M. Middlebrooks. Calendar Call set for 5/9/2018 at 1:15 PM in the West Palm Beach Division before Judge Donald M. Middlebrooks. ORDER REFERRING CASE to Magistrate Judge Shaniek M. Maynard with receipt of notices for all filings in case. Signed by Judge Donald M. Middlebrooks on 9/20/2017. (lrz1) <u>Pattern Jury Instruction Builder - To access the latest, up to date changes to the 11th Circuit Pattern Jury Instructions go to https://pji.ca11.uscourts.gov or click here.</u> (Entered: 09/20/2017)
09/20/2017	<u>8</u>	ANSWER and Affirmative Defenses to Complaint (<i>First Amended Complaint, DE 5</i>) by KeyBank N.A.. Attorney Krista Anne Sivick added to party KeyBank N.A.(pty:dft). (Sivick, Krista) (Entered: 09/20/2017)
09/20/2017	<u>9</u>	MOTION for Judgment on the Pleadings by KeyBank N.A.. (Sivick, Krista) (Entered: 09/20/2017)
09/20/2017	<u>10</u>	Corporate Disclosure Statement by KeyBank N.A. identifying Corporate Parent KeyCorp for KeyBank N.A. (Sivick, Krista) (Entered: 09/20/2017)
09/21/2017	<u>11</u>	SCHEDULING ORDER: Telephonic Scheduling Conference set for 10/10/2017 02:30 PM in Fort Pierce Division before Magistrate Judge Shaniek M. Maynard. -Joint Scheduling Report due by 10/5/2017 Signed by Magistrate Judge Shaniek M. Maynard on 9/21/2017. (cga) (Entered: 09/21/2017)

10/04/2017	12	RESPONSE in Opposition re 9 MOTION for Judgment on the Pleadings filed by C&C Title Services, LLC. Replies due by 10/11/2017. (Waugh, Christian) (Entered: 10/04/2017)
10/06/2017	13	Joint SCHEDULING REPORT - Rule 16.1 by KeyBank N.A. (Attachments: # 1 Text of Proposed Order)(Sivick, Krista) (Entered: 10/06/2017)
10/10/2017	14	ORDER SETTING PRE-TRIAL SCHEDULE AND ORDER REFERRING CASE TO MEDIATION: (Discovery due by 2/2/2018. Dispositive Motions due by 3/2/2018. ORDER REFERRING CASE to Mediation. Signed by Magistrate Judge Shaniek M. Maynard on 10/10/2017. (lrz1) Pattern Jury Instruction Builder - To access the latest, up to date changes to the 11th Circuit Pattern Jury Instructions go to https://pji.ca11.uscourts.gov or click here. (Entered: 10/10/2017)
10/10/2017	15	PAPERLESS Minute Entry for proceedings held before Magistrate Judge Shaniek M. Maynard: Scheduling Conference held on 10/10/2017. Total time in court: 7 minutes. Attorney Appearance(s): Christian W Waugh, Krista Anne Sivick, Jim Slater, Esquire. Pretrial scheduling order to issue. (Digital 143652) (cga) (Entered: 10/10/2017)

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